1943.

# File No. Cr. A. Dwr./43

Legal DEPARTMENT

A BRANCH

Subject:—

Criminal Appeals in the High Court Bombay against the order of Acquittals Dharwar.

P. 27

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Superintendent,
D Branch, Legal Department.

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In the Court of the Additional Sessions Judge, at Dharwat.

Sessions Case No.49 of 1942.

Emperor.

Vs.

1. Devappa Fakirappa of Kotbagi Taluka Dharwar.
2. Gangappa Gurushiddappa of Do.

Offence:-Section 302 of the Indian Penal Code.

J U D G M E N T.

The two accused in this case stand charged of murder under section 302 of the Indian Penal Code.

The facts leading up to this offence, according to the prosecution, appear to be as under:-

Somaya purchased S.Nos.156/5, 157/1 and 157/3,6,7A under the sale deed, Ex.24, on 12-9-1940 from one Fakirappa of Savadatti. Thereafter he filed two suits Nos.172 of 1941 and 173 of 1941, in the court of the Second Class Subordinate Judge of Dharwar and obtained the declaration of his title to these properties and also an order for the possession of these fields. These decrees were obtained on the 30th March 1942. Exs.45 & 46 are the copies of the judgments in these civil suits. In execution of these decrees, Somaya succeeded in getting a warrant of possession and the bailiff of the civil court, one Rajappa, Ex.18, put Somaya in possession of the properties on 11-8-1942. Panchanamas, Exs.19 and 21 bear this out. There are also possession receipts, Exs.20 and 22, showing that Somaya got possession through the bailiff. A woman named Fakirava appear to believe that she was the owner of these properties and it appears from the evidence of Kenchangouda, the panch, Ex.27, that she was all along in possession of these fields , though these fields changed hands on more than one occasion. One Subrayappa and Basappa were the tenants who were actually cultivating the lands for this woman.

On the 13th of August 1942, i.e. two days after Somaya got possession through the civil court of the property,

according to the prosecution, Somaya and his brother Shivaya and their farm servant Fakirappa (Ex.5) and their sister's son, one Chanabasaya Ex.6, went to harrow the field at about 10 O'clock in the morning. At this time, Fakirava and her mother Ningava followed by Subrayappa and accused Nos.1 and 2 came to the field and the women obstructed Shivaya and Somaya from proceeding with their agricultural operations. It is said that accused Nos.1 and 2 and Subrayappa who was the elder brother of accused No.1, told those in the field, to call the kulkarni and the Patil and then proceeded with their work. Those in the field saw no necessity for collecting these village officials as they said that they were put in possession of the fields, in due course of law and ignoring the obstructors, it is alleged, Chanabasaya and Fakirappa started the harrowing, followed by Somaya. Shivaya was left to bandy words with the obstructors. The prosecution case is that accused No.1 had with him a pick-axe with the iron blade of it removed and he struck Shivaya on his head with the handle of this pick-axe. Shivaya had with him an axe, article 8 before the court, and accused No.1 took it up and gave a blow to Shivayya in the region of his neck. Seeing this, Somaya rushed to the spot and fired a pistol and wounded Subrayappa. Subrayappa collapsed as a result of this wound, but got up immediately thereafter and gave a blow with an axe to Somaya. Somaya then struck Subrayappa with the sickle, article 6, and accused No.2 gave a blow with an axe to Somaya. Somaya fell down and died immediately on the spot. Fakirappa, the servant ran to the house of Shivaya and Somaya and informed their mother about this fight and the mother of Somaya and Shivaya, Shivaya's wife and Fakirappa came to the field. Shivaya was given a draught of water and he breathed his last. It is said that Chanabasaya, who was there, picked up the pistol of Somaya and ran with it towards a well, chased by accused No.1 and threw it into the well. Subrayappa was removed below a neem tree. The Police Patil of the village, Ex.25 was not present in the village. The village servant, one Fakirappa, Ex.17, on hearing about this fight, went to the Police out-post at Garag, about 2 or 3 miles from this village, and informed the Havaldar there, of the incident. Havaldar and the village servant came to the village at about 4 P.M. and the Police Patil also returned from Dharwar and met them at the

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village gate. They all proceeded to the scene of offence and there recorded the dying declaration of Subrayappa and also made a panchanama of the injuries on his body. They also held inquests on the dead bodies of Somaya and Shivaya (Exs.28 and 29). They made a panchanama Ex.30 of the scene of offence. They recovered articles Nos.1,2,3,4,6 and 8. Article No.1 is the unused bullet. Articles 2 and 4 are the turbans of Shivaya and Somaya, and article No.6 is the sickle of Somaya. Article 8 is the axe of Shivaya. Article 3 is the blood-stained earth found on the scene of offence. The mother of Shivaya and Somaya gave her complaint in writing which is Ex.4. The Police Patil then drew up his first information report, Ex.26 at about midnight that day. The two dead bodies of Shivaya and Somaya and Subrayappa who was still alive, were sent with the village servant Fakirappa, Ex.17, to Dharwar along with all the papers that were drawn up that day. Subrayappa died shortly after the party passed Garag. The village servant arrived at Dharwar and informed the Sub-Inspector of Police of the offence at 8 A.M. on the 14th. The Sub-Inspector registered the offence and sent the two dead bodies of Shivaya and Somaya to the Civil Hospital for post mortem examination. He then held an inquest on the dead body of Subrayappa and also sent his body for post morten examination to the Civil Hospital after registering the offence. The Sub-Inspector had some work in this court on that day and after taking permission from the court, he went and reached the village of offence at 4-30 P.M. and commenced his investigation and finally sent up the charge-sheet against the two accused. The case relating to the murder of Subrayappa is still with the Police.

Both the accused deny the charge and state that they are falsely implicated.

The points that arise for determination are:-

1. Whether the accused Nos.1 and 2 caused the death of Somaya and Shivaya ?
2. Whether they are guilty of murder of Shivaya and Somaya ?

Reasons.

It is not disputed that both Shivaya and Somaya are dead and the medical evidence in the case, Ex.12, shows that these persons died as a result of the injuries on their persons. Somaya had four

injuries, one injury on the spinal column which cut the spinal chord and fractured the 4th vertibra. There was also an injury on the lobe of the right ear and another incised wound bone deep on the right parietal bone. He had also a contusion above the right ear. Similarly Shivaya had four injuries, 3 of them were caused by a sharp instrument and one, a contusion, by a hard and blunt substance. There was an incised injury on his left eye-brow and the bone below it was fractured. There was another incised wound on the top of the scalp and one incised wound on the occipital bone. Considering these injuries, the opinion of the medical officer is definite that the death of these two persons was the result of the injuries. There is no doubt that the incised injuries on both the persons were caused by an axe and there is no doubt that if the accused caused these injuries, then they were guilty of murder unless the case falls within one of the general exceptions.

The direct evidence on behalf of the prosecution is of two witnesses, Fakirappa (Ex.5) and Chanabasaya Ex.6. There was one more witness, Ex.8, whose statement was recorded under Section 164, Criminal Procedure Code, wherein he showed his presence at the scene of offence but he gave a go-bye to that statement before the Committing Magistrate as also before this court. The prosecution do not rely on this witness under these circumstances. There is little doubt in my mind about the presence of Fakirappa, Ex.5, at the scene of offence. He was the farm servant of the two deceased brothers Shivaya and Somaya. It is proved fr the evidence and the circumstances in the case that the two deceased brothers went to the field in question with the clear object of doing some agricultural work in it. They went there with a harrow with bullocks and it is natural that the farm servant would be with them. The other witness Chanabasaya is the sister's son of the deceased. This boy has been with them sinee his birth. He attends the village school and is in Standard VII in Kannada. The school hours are in the mornings and afternoons. The morning hours end at 10 A.M. Chanabasaya admits that he had never gone to do any field work, but on that day his uncles sent for him from the school half an hour earlier as he had to get his hair cropped. Then he took his bath & joined his uncles to the field. Fakirappa says that this Chanabasaya was working the harrowing machine. Fakirappa and Somaya

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followed the harrowing machine. It is argued on behalf of the accused Chanabasaya must not be in the field at the time of the offence. It is suggested that the reason for his leaving the school earlier is bogus. The boy certainly could have the services of a barber after 10 O'clock, after he finished his school hours and it is also suggested that this boy would not be made to work the harrowing machine, the operation of which he did not know. These contradictions appeal to me and I am inclined to say that Chanabasaya was not there exactly at the time of the offence though it is very likely that he must have gone there from the school, after hearing the pistol shot. The evidence of one Nagappa, Ex.10, and the evidence of Basappa Ex.8, read with the evidence of - Chanabasaya makes this conclusion firm. Basappa says that while he was near about the school, he heard a gun shot and he saw many people coming from the fields to the village and vice versa. Similarly Chanabasaya has stated that he saw many persons passing by the foot-track near the scene of offence and he also saw - Nagappa in the adjoining field and according to Nagappa he came there after the offence and he saw the mother and the wife of Shivaya and Chanabasaya and Fakirappa on one side and also - Subrayappa, with accused Nos.1 and 2 and Fakirava and Ningava, the two women, below a neem tree. Thus viewed, the evidence of Fakirappa Ex.5 remains and he has stated that he saw accused No.1 with a pick-axe in his hand, the iron blade of which was removed and with the handle of this pick-axe accused No.1 gave a blow somewhere on the head of Shivaya. Accused No.2 took the axe of Shivaya and gave another blow on the head of Shivaya. That ~~xxxxxx~~ ~~is~~ axe is article 8 in the case. Somaya who saw this rushed to the spot and fired a pistol shot wounding Subrayappa in his abdomen. The medical evidence shows this wound as injuries Nos.2 and 4 and it appears that this bullet made an opening on one side of the abdomen and practically reached the other end, from where the lead shot was taken out. Subrayappa sank as a result of this wound. Then he got up and gave a blow with an axe to Somaya near the neck of Somaya. The witness in cross examination says that accused No.2 gave another blow with an axe on the right side of the neck of Somaya. Witness Chanabasaya who, I believe, must have

come to the scene of offence at about this time, says that Somaya was then giving a blow with his sickle to Subrayappa and that time accused No.2 gave an axe blow Somaya. It is after this that Chanabasaya picked up the pistol and threw it into the well. This is all the evidence of the prosecution.

Accused Nos.1 and 2 were arrested by the Sub-Inspector of Police on the night of the 14th and were sent up to the magisterial custody on the 15th, with a letter that their confessions may be recorded. Both these accused have made their confessional statements before the Magistrate and they are Exs.52 and 56 respectively. Accused No.1 admits that he struck Shivaya with the handle of pick-axe but he says that he did so in order to save himself from the blow of the axe of Shivaya. Accused No.2 admits that he snatched away the axe from Shivaya when he was about to strike accused No.1. He also admits that he gave a blow with the axe to Somaya, who was giving blows with the sickle to Subrayappa after he was shot. With these statementsof the accused, in my opinion, the evidence of Fakirappa and a portion of the evidence of Chanabasaya fit in. The case would have been simpler for decision but the accused have retracted their confessions before the Committing Magistrate and they also have retracted them in this court. Their case, in this court, is only a denial of the offence. They say nothing further than that. Accused No.1 says that Fakirappa and Chanabasaya gave evidence as they are interested in the deceased. Accused No.2 also says the same and adds that are on inimical terms with him.

The question, therefore, that arises for consideration is whether these confessions of the accused were voluntarily made or were forced from them by the Police, as is the stand taken up by the accused now, and secondly whether these confessional statements were substantially true. I feel satisfied that the confessional statements of these two accused were both voluntary and true. Apart from the fact that the accused were in Magisterial custody, at the time of making these confessional statements, the Magistrate recording the confessions has complied with all the requirements laid down in the High Court Criminal Circulars and has satisfied himself that the accused had neither been subjected to

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violence nor threat nor pressure. The intrinsic evidence afforded by the confessions themselves also suggests their voluntary and true nature. As I read the confessional statements, I find that these statements in effect propound clearly a case of self defence. I do not believe that if these confessional statements were made as a result of beating or threat of beating from the Police, they would be as they are. There is nothing in these statements fixing the guilt point blank on the accused. I do not think that the Police would feel interested in securing such confessional statements, as I have shown above, are also borne out in material particulars, by independent evidence, in this case of Fakirappa, Ex.5 and to some extent by the evidence of Chanabasa-ya. I am, therefore, inclined to take into consideration, these statements in the determination of this case.

A further question arises as to whether there statements can be used by the court on behalf of the accused to make out a case of private defence. It is no doubt true that the accused have not pleaded specifically, right of self defence in this court. It is for the accused to plead right of self defence and prove it. In this connection there is the case of Upendranath Das reported in 19 Cal. Weekly notes where Justice Woodroffs has observed, "It cannot be laid down as a general proposition of universal applicability that a court cannot and should not consider the case in favour of accused which he has not raised. If such a case arises on the prosecution evidence, it should be put to the jury for their consideration, whatever line might have been taken by the accused or his counsel". Apart from this, on general principle I am of the same opinion. It is not obligatory on the accused to make any statement. It is open to them not to explain anything nor to plead anything. In this case, this is what the accused have done. The court, notwithstanding the silence of the accused, has to apply his mind to the evidence produced before it and to decide the guilt or otherwise of the accused. As I have held that the confessional statements should be taken into consideration as evidence in the case, I have to view the other evidence in the case along with the confessional statements and thus viewed, I feel that the injuries inflicted by the accused on deceased

Shivaya were in self defence.

The prosecution evidence shows that Shivaya went to the field in question with an axe, article 8. Somaya went there with the sickle, article 6. In addition there is, no manner of doubt that he possessed a pistol without any license and at least he had two bullets, one of which was found at the scene of offence and which remained unused, article No.1, and another was found imbeded in the abdominal muscle of the deceased Subrayappa. As against this, the prosecution evidence itself shows that accused No.2 went to the field without any weapon and that accused No.1 went there with a pick-axe but he removed the iron blade, either before reaching the field or after reaching the field, and that he had only the wooden handle of the pick-axe, article 7. I am not satisfied that the deceased Subrayappa went to the field with the axe, article No.5. This was found as a result of the search from the house of accused No.1, joint brother of deceased Subrayappa, on the 14th of August 1942. This axe did not show any blood on it. That is the report of the Chemical Analyser and the Imperial Serologist. Besides, it is alleged by the prosecution that accused No.1 concealed the handle of the pick-axe in the hedge, near the scene of offence, from which it was found as a result of accused No.1's showing it to the panch and for which the panchanama, Ex.31, was made. The evidence clearly establishes that Subrayappa was mortally wounded and he remained lying below a neem tree, on the scene of offence, and he could not have removed this axe from the scene of offence to his house. If at all, it would be accused No.1 who could and would remove it and place it in his house below a box. Accused No.1 actually concealed the handle of the pick-axe, knowing probably that he had used it for beating Shivaya. He, in the ordinary course, would also try to do away with the axe, article 8, if he had seen it used by the deceased Subrayappa in inflicting injuries on the deceased Somaya. I do not believe that deceased Subrayappa used the axe, article 8, in inflicting injury on Somaya. He must have used the axe article 5 for inflicting injury on Somaya. This axe was found to have blood on it and it was found on the scene of offence. Thus I conclude that deceased Subrayappa and accused Nos.1

2 must not have gone to the field with the object of taking the offensive and beating Shivaya and Somaya. The evidence of the two eye-witnesses on behalf of the prosecution bear this out, when they say that the accused and Subrayappa only insisted on collecting the village officials before proceeding with the agricultural operations in the field. In my opinion it must be deceased - Shivaya who must have begun the offensive, by attempting to strike accused No.1 with his axe and then the fight must have ensued as stated by accused Nos.1 and 2 in their confessional statements. I do not believe witness Fakirappa when he says that it was the accused No.1 who started the offensive by striking Shivaya. That would not be probable in view of the natural attitudes of - Chanabasaya Subrayappa and accused Nos.1 and 2. I do not believe Chanabasaya when he says that accused No.1 gave another blow to Shivaya with the handle of the pick-axe when Chanabasaya went to the Nulla to wet his dhoti, in order to render first aid to the wounds of Shivaya. I believe that accused No.1 must have given a blow to Shivaya with the handle of the pick-axe and accused No.2 must have given a blow with the axe x of Shivaya after snatching it from him, in order to disable him from inflicting any further injury. Accused No.2 must have similarly given a blow with the same axe to Somaya in order to stop him from striking with the sickle to Subrayappa who had already received a bullet would. This is admitted even by Chanabasaya.

In the result, on the prosecution evidence, as is placed before this court, I hold that accused Nos.1 and 2 inflicted - injuries on deceased Shivaya and Somaya in the exercise of the right of private defence. I agree with the unanimous opinion of all the assessors when they say that the accused are not guilty. I agree with the opinion of assessor No.1 when he says that the confessional statements of accused Nos.1 and 2 were true but differ from him when he says that they were not voluntary. I agree with the opinion of assessors Nos.1 and 4 when they say that the accused inflicted injuries in the exercise of their private - defence. I do not accept the opinion of assessors Nos.2 and 3 when they say that the accused were not on the scene of offence.

O R D E R.

I find accused Nos.1 and 2 not guilty on the charge of murder and acquit them and order them to be set at liberty.

27th February 1943. Sd/ I.A.Shaikh.

Additional Sessions Judge.

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Judgment recorded by the High Court in Criminal Appeal No.180 of 1943 ( By the Government of the Province of Bombay) in the case of Imp.Vs.Devappa Fakirappa No.1 and another No.2.

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The Government Pleader for the appellant ( The Government of Bombay).

Mr. K.R. Bengeri, Advocate for accused No.1.

Mr. G.R. Madbhavi, Advocate for accused No.2.

23rd September 1943.

( Coram : Wadia and Lokur, JJ.)

Oral judgment ( per Wadia, J.) :- This is an appeal by the Government of Bombay against an acquittal. The two accused Devappa and Gangappa were tried by the Addition-al Sessions Judge of Dharwar with the aid of Assessors for murder. The charge against them was that on the 13th August 1942 they committed the murder of Somaya and Shivaya. The Assessors were unanimously of opinion that both the accused were not guilty and the learned Session Judge agreed with that opinion and acquitted the accused.

The quarrel in the course of which Somaya and Shivaya were killed arose out of a dispute with regard to some lands. The deceased Somaya had purchased certain lands from one Fakirappa of Savadatti. He filed two suits with regard to them in the Court of the Second Class Subordinate Judge of Dharwar for a declaration of his title to the lands and for possession, and got decrees in March 1942. On the 11th August 1942 he was put in possession of the lands by the Court. It appears that a woman named Fakirava had been cultivating the lands prior to Somaya's purchase of them, and one Fakirappa Kallappa, who was a defendant in one of the suits filed by Somaya, was a tenant of the lands. The 1st accused Devappa is a son of this Fakirappa. Two days after Somaya had been put in possession of the lands by

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the bailiff of the Court he, accompanied by his brother Shivaya, his nephew Chanbasaya a boy of 16, and their servant Fakirappa, went to one of the fields to harrow it. Fakirava went to the land to prevent Somaya and his party from cultivating it. She was accompanied by her mother Ningawa and by the two accused and Subraya-ppa the brother of accused No.1, and an altercation ensued. The prosecution case is that Fakirava objected to Somaya and Shivaya proceeding with their harrowing operations and that she and the two accused and Subrayappa told Shivaya and Somaya and their party to call the village officers before they proceeded with the harrowing of the field. Somaya considered that as he had been formally put in possession of the field by the Civil Court there was no reason for him to call the village officers, and insisted on going on with his work. He, ~~and~~ Chanbasaya and Fakirappa started harrowing the field, Shivaya remained behind arguing with Fakirava and her party. It is alleged that accused No.1, who had a pick-axe with him, removed the head of the axe and then struck Shivaya ~~and~~ on the head with the handle. Shivaya admittedly had an axe with him. It is alleged that accused No.2 seized the axe from Shivaya and struck him with it on the neck. Thereupon Somaya rushed up and fired a pistol at Subrayappa, wounding him in the stomach. Subrayappa fell down but got up at once and struck Somaya with an axe. Somaya, who had a sickle with him beside the pistol, then struck Subrayappa with the sickle, and accused No.2 Gangappa also struck Somaya with the axe, with the result that Somaya fell down and died. Fakirappa, the servant of the deceased, ran to their house and informed their mother who went to the field at once accompanied by others. Somaya was already dead. Shivaya died very soon after. Subrayappa died later on the same day when he was being taken to the hospital

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at Dharwar. The pistol which Somaya had fired is alleged to have been picked up by his nephew Chanbasayya and to have been thrown into a well. It was never found although the Police searched for it. On the person of Somaya and unused cartridge was found. A complaint was made to the Police Patel who sent a report to the Sub-Inspector and investigation started. On these facts the two accused were put up for trial for the murder of Somaya and Shivaya.

The prosecution examined Fakirappa and Chanbasaya who are the only two eye-witnesses of the offence. Both of them have started that it was accused No.1 who first struck Shivaya on the head with the handle of his pick-axe. According to Fakirappa Shivaya fell down on receiving the blow. Accused No.2 thereupon seized his axe and struck him with it on the head. Somaya thereupon rushed up and fired a pistol at Subrayappa. Subrayappa fell down on receiving the shot, got up against and struck Somaya with his axe on the neck. In his cross-examination he added a further statement that accused No.2 also had struck Somaya with an axe and that it was after this blow by accused No.2 that Subrayappa got up and struck Somaya. Chanbasaya gives the same story as to the beginning of the fight. He also says that accused No.1 gave a blow to Shivaya on the head with the handle of his axe. Shivaya fell down and then accused No.2 gave him a blow with his own axe. Somaya thereupon fired at Subbayappa. Accused No.2 then struck Somaya with an axe and after Somaya had fallen down Subraya got up and struck Somaya on the neck with an axe. He alleges that after this accused No.1 gave a second blow to Shivaya with the handle of his axe.

The medical evidence shows that Somaya had six injuries on his person one of which was an incised would cutting the spinal column and fracturing the 4th

cervical vertebra. He had another incised wound on the upper part of the right parietal bone. There was a fracture of the 4th vertebra below the first wound and fractures also of the temporal and parietal bones. According to the evidence of the two prosecution witnesses Fakirappa and Chanbasaya, the only injuries which Somaya received were two wounds on the neck one from Subrayappa and the second from accused No.2. This evidence does not explain the very serious injury which was found on Somaya's head and the fractures of the temporal and parietal bones. This latter injury is explained by the statement of accused No.2 who says that after Somaya had fired at Subrayappa he gave Subrayappa a blow with a sickle on the head and another blow on his back. Accused No.2 himself then gave a blow on the head of Somaya. Shivaya also had six injuries on his person, three of them being incised wounds on the head and two being fractures on different parts of the head. In the case of Shivaya also the evidence of Fakirappa and Chanbasaya does not account for all the injuries which were found on him. Subrayappa had four injuries on his person, one being a wound in the stomach, two being incised wounds, one on the head, and the other on the left side of the back and the fourth being an ecchymosis in the right lumber region of the abdomen.

From the fact that the statements of the two prosecution witnesses do not explain all the injuries which were found on Somaya, Shivaya and Subrayappa, it is clear that they have either deliberately suppressed some of the incidents of the fight or that they had not observed all the incidents that had taken place. But there are certain facts which appear clearly from their evidence. It is admitted by both of them that when accused No.1 came up to Somaya and Shivaya and protested

he deliberately removed the head of his pick-axe from the handle, and the blow or blows which he is said to have given to Shivaya were admittedly given only with the handle of the pick-axe. Another fact which is admitted by both the prosecution witnesses is that one of the three men in the accused's party had no weapon with him. Only one of the three had an axe at the time of the fight. It is also admitted by them that the accused asked Somaya and Shivaya to call the village officers before starting to harrow the field. Another very significant fact which is admitted by the prosecu--tion witnesses is that both Shivaya and Somaya had gone well armed. Shivaya had an axe and Somaya had with him a pistol and two cartridges, one of these was used by him in firing at Subrayappa and the other was found on his person by the Patel and the Panchas at the time of the inquest. It is also not disputed that two women Fakirava and her mother Ningawa were with the accused at the time of the offence, and that it was Fakirava who principally objected to Shivaya and Somaya cultivating the lands.

Both the accused were arrested on the 14th August and were sent to the First Class Magistrate at Dharwar on the 15th. Both of them made confessions befor him on the following day, the 16th. These confessions were retracted at the trial. They admitted having made the confessions, but alleged that they had made them because the police threatened to beat them. The Magistrate who recorded the confessions took all the usual precautions to satisfy himself that the confes--sions were being voluntarily made. He also examined the persons of the accused and found that there were no marks of illtreatment on them. The learned Judge has disbelieved the story of the accused about the confessions having been made because of threats or illtreatment by the Police, and has treated them as

both voluntary and true. We agree entirely with that view. The contents of the confessions themselves show that they could not have been due to tutoring or threats by the Police. Both the accused admit in their confessions having struck Shivaya and Somaya, but both say that they did so in self-defence. Accused No.1's story is that he and his brother had been cultivating the lands as tenants of Fakirava and that they were not aware of the fact that the bailiff of the Court had handed over possession of the lands, to Somaya, but were under the impression that the bailiff would inform them when the possession was to be handed over. He says that on the day of the offence Somaya, Shivaya, Chanbasaya and Fakirappa went to the land at about 11-30 with bullocks and ploughs to plough it; that Fakirava went to the land to obstruct them and that she asked accused No.1's elder brother Subrayappa and accused No.2 Gangappa to advise Somaya not to plough the land till they had got possession of it in the proper manner. He says that Subrayappa and accused No.2 accordingly went to the land with Fakirava, and accused No.1 also followed them. According to him Shivaya, Somaya and Chanbasaya started beating Fakirava and her mother Ningawa. Subrayappa asked them not to do so and not to quarrel. Somaya thereupon said that he had taken possession of the land and would plough it. Accused No.1 then told Shivaya not to quarrel and to refer the matter to the village panchas. He says that thereupon Shivaya rushed at him to strike him with an axe. Fearing that he would be struck, he struck Shivaya on the head with the handle of his spade. Upon this Somaya fired a pistol at Subrayappa and Subrayappa then struck Somaya on the neck with his axe. Accused No.2's story is much the same. He also says that when Fakirava objected to Shivaya and Somaya ploughing the field, Shivaya dragged her and beat her. Accused No.2 thereupo

told Shivaya not to beat the woman and to call Panchas and the Patil and Kulkarni to settle the dispute. Shivaya did not listen and rushed at accused No.1 with an axe. Accused No.2 says that he caught hol of Shivaya's axe and accused No.1 then gave a blow on the head with the handle of the spade. Shivaya fell down. Somaya then fired a pistol at Subrayappa and also struck him on the head and on the back with a scythe. Accused No.2 thereupon gave a blow to Somaya on the head and thereafter Subrayappa gave Somaya a blow on the neck with an axe.

On this evidence it would in our opinion be very difficult to say that the view taken by the learned Sessions Judge and the Assessors that the accused had struck Somaya and Shivaya in self-defence is wrong. That Fakirappa and Chanbasaya, who are the only two eye-witnesses examined by the prosecution have not given out the whole story is clear from the fact that the accounts given by them are not consistent with each other and with the injuries found on the persons of the three men by the Doctor. There are moreover certain facts, clearly admitted by the prosecution witnesses which give strong support to the view which the learned Sessions Judge and the Assessors have taken. Admittedly the party of the accused went to the field accompanied by two women. One of the accused's party wa not armed at all and the other, accused No.1, who had a pick-axe with him, deliberately removed the head of the pick-axe and used only the handle in the fight. It is admitted also that both the accused asked Somaya and Shivaya to call the village officers and Panchas to settle the dispute and not to start ploughing or harrowing the lands before doing so. This is not the conduct of men who wanted to forcibly prevent Shivaya and Somaya from ploughing the lands and who wanted to forcibly turn them out of the lands. On the other

hand, the fact that one of the deceased, Somaya went to the place armed with a pistol and two cartridges shows clearly that his party were determined to use violence if any obstruction was offered to them. Shivaya also went armed with an axe. Admittedly Somaya fired at Subrayappa before Subrayappa had done anything to him or to any of the other members of his party. Once Somaya had fired and seriously wounded Subrayappa the accused would be justified in thinking that they themselves would be similarly fired at unless they disabled Somaya and prevented him from doing so. The question is which side was responsible for starting the fight. That the first blow was struck by accused No.1 is admitted by both the accused, but they say that the blow was struck because Shivaya rushed at accused No.1 with an axe. Admitedly accused No.1's blow was not struck with any particularly dangerous weapon. It was only the handle of the axe which had been used. The head had been deliberately removed. From the surrounding circumstances we think that the probabilities are entirely in favour of the accused's story being true that it was Shivaya who rushed at accused No.1 and that accused No.1 fearing that he would be struck with the axe, struck at Shivaya in self-defence. It is not clear from the evidence in what order the subsequent events followed. Much has been made of the fact that accused No.2 is alleged to have struck Shivaya after he had been knocked down by the blow given him by accused No.1. But it is to be borne in mind that Somaya shot down Subrayappa, one of the accused's party, and it is possible that accused No.2 may have thought that Shivaya would get up and again use his axe either against himself or against accused No.1 and may have struck at Shivaya in self-defence.

On the facts of the case we are not therefore prepared to differ from the view which the learned Sessions Judge and the Assessors have taken.

The appeal is dismissed.

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Per Lokur J.:-

I agree and have nothing to add.

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By the Court,

Sd. M. G. Rao,

Deputy Registrar.